

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ANTHONY NICOSIA, et al.,

Plaintiffs,

v.

WELLS FARGO BANK, et al.,

Defendants.

No. C 10-0398 PJH

**ORDER GRANTING MOTION
TO DISMISS**

Defendants' motions to dismiss plaintiff's complaint came on for hearing on June 23, 2010 before this court. Plaintiffs Anthony Nicosia and Kathryn Nicosia ("plaintiffs") appeared through their counsel, Glenn Moss. Defendants Wells Fargo Bank, N.A., Wells Fargo Home Mortgage (collectively "Wells Fargo") and First American Loanstar Trustee Services, LLC ("Loanstar") (all collectively "defendants"), appeared through their counsel, Jon D. Ives, and Natalie Sperry, respectively. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendants' motions to dismiss, for the reasons stated at the hearing, and summarized as follows:

1. Plaintiffs' first claim for relief alleging declaratory and injunctive relief against all defendants, is DISMISSED for failure to state a claim. Since there is no viable cause of action for injunctive relief, this portion of the claim is dismissed with prejudice. See Shamsian v. Atl. Richfield Co., 107 Cal. App. 4th 967, 984-85 (2003)(claim for injunctive relief by itself does not state a cause of action). To the extent plaintiffs seek declaratory relief, however, plaintiffs' claim is dismissed with leave to amend, so that plaintiffs may

1 properly allege the existence of an actual controversy – i.e., some independent legal duty
2 at issue – regarding the legal rights of the parties. See, e.g., McClain v. Octagon Plaza,
3 LLC, 159 Cal. App. 4th 784, 800 (2008).

4 2. As conceded by plaintiffs' counsel at the hearing on this matter, plaintiffs'
5 Truth In Lending Act ("TILA") claim against Wells Fargo is DISMISSED with prejudice, as
6 the claim – whether based on a claim for damages or rescission – is time-barred.

7 3. Plaintiff's Fair Debt Collection Practices Act ("FDCPA") claim against Wells
8 Fargo Home Mortgage and Loanstar is also DISMISSED. Plaintiffs allege that both
9 defendants are "loan servicers" and that both defendants – collectively and without
10 differentiation – violated the FDCPA in their efforts to collect on the mortgage loan in
11 question. See Complaint, ¶¶ 5, 25. However, "foreclosing on [a] property pursuant to a
12 deed of trust is not the collection of a debt within the meaning of the FDCPA...". See, e.g.,
13 Izenberg v. ETS Services, LLC, 589 F. Supp. 2d 1193, 1199 (C.D. Cal. 2008); Medina v.
14 EMC Mortg. Corp., 2010 WL 2573006, *3 (N.D. Cal. 2010); Hulse v. Ocwen Fed. Bank,
15 FSB, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002). Thus, plaintiffs fail to plead that
16 defendants were "collecting a debt" within the meaning of the Act. Moreover, loan servicers
17 seeking to collect a debt that was not in default at the time acquired by them – as appears
18 to be the case here – are also not collecting a debt under the FDCPA. See Bailey v.
19 Security Nat'l Servicing Corp., 154 F.3d 384, 387 (7th Cir.1998)(FDCPA treats assignees
20 as debt collectors if the debt sought to be collected was in default when acquired by the
21 assignee, and as creditors if it was not); Whitaker v. Ameritech Corp., 129 F.3d 952, 958
22 (7th Cir.1997); see also Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 403-04 (3d
23 Cir.2000); Wadlington v. Credit Acceptance Corp., 76 F.3d 103, 106-07 (6th Cir.1996);
24 Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir.1985). Plaintiffs' contrary reliance
25 on Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA is inapposite, since Jerman held
26 that the bona fide error defense in the FDCPA does not apply to violations of FDCPA
27 resulting from a debt collector's incorrect interpretation of legal requirements of the Act.
28

1 See 130 S.Ct. 1605 (2010). Accordingly, FDCPA claim is DISMISSED with prejudice.

2 4. With regard to plaintiffs' fourth claim for relief against Wells Fargo Home
3 Mortgage and Loanstar alleging violations of RESPA, plaintiffs' claim fails to plead
4 actionable conduct against either defendant with sufficient factual detail, or to allege
5 particularized and identifiable conduct taken by each individual defendant entity.
6 Furthermore, with respect to Loanstar, plaintiffs cannot plausibly allege that Loanstar is a
7 loan "servicer," as covered by RESPA. Thus, the RESPA claim is DISMISSED. The
8 dismissal is with prejudice as to Loanstar. Plaintiffs are granted leave to amend the claim
9 as to Wells Fargo, however, so that plaintiffs may attempt to more specifically allege some
10 form of actionable conduct by Wells Fargo in connection with its notification to plaintiffs "of
11 the sale, assignment or transfer of servicing rights" related to the subject loans and
12 property.

13 5. Plaintiff's Cal. Bus. & Prof. Code § 17200 claim alleging unfair/deceptive
14 business practices fails because, given plaintiffs' failure to state viable causes of action as
15 addressed herein, there is no predicate violation upon which plaintiffs can base their
16 section 17200 claim. Furthermore, plaintiffs' complaint fails to allege the conduct engaged
17 in by each defendant specifically, in particularized detail. See Silicon Knights, Inc. v.
18 Crystal Dynamics, Inc., 983 F. Supp. 1303, 1316 (N.D. Cal. 1997)("[a] plaintiff alleging
19 unfair business practices under the unfair competition statutes 'must state with reasonable
20 particularity the facts supporting the statutory elements of the violation.'"). Accordingly, this
21 claim, alleged against all defendants, is DISMISSED. Leave to amend is granted so that
22 plaintiffs may attempt to cure the foregoing deficiencies.

23 6. Plaintiffs' breach of contract claim against Wells Fargo is also DISMISSED,
24 for failure to identify a specific written provision of any existing contract that was purportedly
25 breached by either of the Wells Fargo defendant entities, or the manner in which Wells
26 Fargo breached such a contract. The dismissal is with leave to amend, so that plaintiffs
27 may attempt to cure these deficiencies.

Plaintiffs' amended complaint shall be due no later than July 28, 2010.

IT IS SO ORDERED.

Dated: July 7, 2010



PHYLLIS J. HAMILTON
United States District Judge